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9 DATAWAY, INC.

10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN FRANCISCO DIVISION**

13 AT&T Corp.

14 PLAINTIFF,

15 v.

16 Dataway, Inc.

17 DEFENDANT.

**CASE NO. C07-02440 EDL**

**DEFENDANT DATWAY'S  
OPPOSITION TO PLAINTIFF AT&T'S  
MOTION FOR SUMMARY  
JUDGMENT OR PARTIAL SUMMARY  
JUDGMENT**

18 Dataway, Inc.

19 COUNTERCLAIMANT

20 v.

21 AT&T Corp.

22 COUNTERDEFENDANT

**Date: August 5, 2008  
Time: 9:00 a.m.  
Courtroom: E**

23 //

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Defendant Dataway hereby opposes Plaintiff AT&T's dispositive motion pursuant to Fed. R. Civ. P. § 56 and Local Rule 56-1. As the record evidence does not support each element of Plaintiff's complaint but is sufficient to establish each element of Counterplaintiff Dataway's Countercomplaint, this Court should deny Plaintiff AT&T's Motion for Summary Judgment (hereinafter "Mot. SJ") and only enter summary judgment pursuant to Fed. R. Civ. P. § 56(a) in favor of Counterplaintiff Dataway.

## **I. INTRODUCTION**

This litigation began as a collection action in which Plaintiff AT&T alleges that Dataway is responsible for certain charges for telephone calls made to the Philippines using AT&T services and further alleges Dataway has refused to pay said charges. Dataway denies that it incurred said charges but that the alleged charges were the result of the unauthorized, intervening criminal conduct of third-party hackers from a remote location and not made using the services contracted for by Dataway, but charged to an account neither opened, maintained, nor authorized by Dataway. Defendant asserts, moreover, that Plaintiff promised to set up protections against both "slamming" (switching telecommunications services without direct instructions from the customer) and also against fraudulent access by third parties, and that it failed to do so, resulting in the charges which it now seeks to recover from Defendant. Therefore, Dataway has counterclaimed against Plaintiff alleging various contract breaches, fraud and violation of the "anti-slamming" law, 47 U.S.C. § 258.

## **II. LEGAL STANDARD**

A Motion for Summary Adjudication pursuant to Fed. R. Civ. P. § 56(a) shall be entered if there is no issue for trial, if no rational, reasonable jury would return a verdict in the nonmoving party's favor. Fed. R. Civ. P. § 56(c) states that that the pleadings, dispositions, answers to interrogatories and admissions on file, together with the affidavits have to show that there is no genuine issue as to any material fact. Supporting and opposing affidavits "...shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify. Fed. R. Civ. P. § 56(e). Based on the specific facts on record and the undisputed, background, and contextual facts, this Court should not grant Plaintiff's Motion for

Summary Judgment in AT&T's favor upon its Complaint for Damages but enter summary judgment in Dataway's favor upon its Counterclaims.

## **II. ALLEGEDLY UNDISPUTED AND IN FACT UNDISPUTED FACTS**

On page 1-3 of Plaintiff's Motion for Summary Judgment, AT&T states facts and wrongfully alleges that these facts are undisputed.

### **A. Actual Undisputed Facts**

AT&T fails to mention that (1) there are undisputed facts that support Dataway's assertions and (2) AT&T's so-called undisputed facts are unsupported by the record. These are all facts and allegations stated in Dataway's Answer and in its Counterclaims. AT&T never responded to these pleadings. A failure to respond to a pleading to which a response is required results in an admission of the averment to which no response is made. Fed. R. Civ. P. 8(b)(6). Pursuant to Fed. R. Civ. P. 12(a)(1)(C) a party "...must serve a reply to an answer within 20 days after being served with an order to reply, unless the order specifies a different time." Fed. R. Civ. P. 12(a)(1)(C). The responsive pleading to a counterclaim is a reply. A reply to a counterclaim must be designated as such (Fed. R. Civ. P. 7(a)) and must be served 20 days after service of the answer. Fed. R. Civ. P. 12(a)(1)(A). None of these responsive pleadings were filed and/or served by AT&T. Instead, AT&T only filed a motion to dismiss. This motion merely extends Plaintiff's time to answer but does not constitute a responsive pleading. Hence, all facts and allegations in Dataway's Answer and Counterclaim are admitted pursuant to Fed. R. Civ. P. 8(b)(6).

### **B. Most Facts asserted by AT&T in its Motion for Summary Judgment p. 1 l.5 – p. 3 l. 15 are in fact disputed, not proven by evidence on the record, and/or proved contrary by the record**

On pages 1-3 of Plaintiff's Motion for Summary Judgment, AT&T states "facts" and in almost each allegation wrongfully represents that these "facts" are undisputed.

#### **1. Dataway does not dispute Facts No. 1, 2 and 17**

Defendant merely agrees that the following is undisputed, that (1) Plaintiff AT&T is a New York corporation, doing business in the State of California (§ 1 of Defendant's Answer

1 that was admitted by AT&T as explained supra (hereinafter “ Adm. Answ.”)), (2) that  
 2 Defendant Dataway is a California corporation with its principal place of business in San  
 3 Francisco, California (§ 2 of the Adm. Answ.), and (3) that AT&T made demand for charges  
 4 amounting to \$ 11,534.67 and a billing dispute ensued (see Mot. SJ. p.2 l.26-27). Hence, only  
 5 the facts that Plaintiff numbered # 1, 2 and 17 are undisputed.

6 2. AT&T’s so-called “undisputed facts” are either still in controversy or run contrary to  
 7 the contract

8 All other purported facts allegedly supporting AT&T’s asserted claims are in dispute  
 9 and were not proven by any evidence that was properly produced. Unlike alleged in  
 10 Defendant’s Motion for Summary Judgment, Defendant challenged Plaintiff’s facts # 3 and 4,  
 11 the Subject Matter Jurisdiction of this Court and Venue. See §§ 5 and 6 of the Adm. Answ.

12 The “facts” # 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, are solely supported by the affidavit of  
 13 Mr. Lakes which is insufficient for three reasons. First, Mr. James Lake is a person so far not  
 14 involved in the dispute and unknown to Defendant. This is particularly remarkable as Plaintiff  
 15 had several chances to produce Mr. Lakes but failed to do so. In particular, Dataway requested  
 16 to conduct a deposition of the most knowledgeable officer, director, managing agent, employee  
 17 and/or agent of the Fraud Resolution Group (Investigative Management), responsible for AT&T  
 18 customers in the San Francisco area, who worked for AT&T and/or can testify on events or  
 19 surrounding circumstances relating to fraud resolution and shortfall investigation between May  
 20 2006 and May 2007, and who are most qualified to testify on its behalf regarding the  
 21 appropriate areas of examination. See Notice of Deposition, Exhibit A. Mr. Lake appears to be  
 22 the actual person most knowledgeable on the foregoing matters but AT&T failed to disclose or  
 23 produce Mr. Lake throughout the proper discovery period effectively running contrary to the  
 24 courts discovery rules and orders. Hence, Mr. Lake’s statements should be disregarded because  
 25 Defendant did not have a chance to cross-examine Mr. Lakes. Producing Mr. Lakes at this late  
 26 stage of the proceeding creates serious issues of material fact and denies Dataway’s discovery  
 27 rights.

1 Second, in ¶ 5 of his declaration, Mr. Lake states that he can and does merely testify to  
 2 the identity of AT&T's records and documents. See Declaration of James Lake, p. 2 l.15-23.  
 3 These documents are out of court statements that were not made by the affiant and are now  
 4 offered for evidence to prove the truth of the matter asserted. Mr. Lake's statements are  
 5 inadmissible hearsay and do not satisfy FED. R. CIV. P. § 56(e) because Mr. Lake does not  
 6 base his affidavit on facts that would be permissible in evidence. His declaration cannot be used  
 7 as a supporting affidavit.

8 Third, almost all of "facts" No. 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, which are solely  
 9 supported by Mr. Lake's affidavit were (1) previously disputed by Defendant, (2) no other  
 10 evidence was produced that would prove AT&T's allegations and/or (3) the facts, stated in the  
 11 contrary, were admitted by AT&T due to its failure to respond to Dataway's Answer and its  
 12 Counterclaim (hereinafter "Adm. CC"). "Fact" No. 5: At no point was it established how the  
 13 unauthorized Legacy T account was established. Neither Simon Lewis nor Francisco Molieri  
 14 knew that the hacker might have used AT&T's "Casual Calling Services." See Deposition of  
 15 Francisco Molieri, p. 18 l. 12-23, p. 59 l.18, Declaration of Simon Lewis, p. 11 l.16 – p.12 l.3,  
 16 Adm. CC. ¶ 10. Expert discovery will be necessary to determine what method the hackers used  
 17 and how they conducted the calls to the Philippines. "Fact" No.6: It is not established why  
 18 Tariff 30 is relevant to the dispute at hand and Dataway argues that the tariff is not applicable  
 19 because it never authorized the calls and should not be charged for them in the first place. There  
 20 is no evidence on record that Tariff 30 governs Legacy S accounts and/or unauthorized Legacy  
 21 T accounts. Adm. CC. ¶ 35. "Fact" No.8: Dataway alleged in all its pleadings and confirmed  
 22 through discovery that the changes that were made to its telephone service were made without  
 23 its authorization and that the calls were not executed by Dataway. Adm. CC. ¶¶ 8, 10, 34. On p.  
 24 2 l.4 of the Mot. SJ. AT&T even concedes that it is likely/possible that the calls were not  
 25 authorized. "Fact" No. 9: Dataway asserts that the calls made on July 24, 2006 were the  
 26 responsibility of AT&T because it failed to impose sufficient security means. Adm. CC. ¶¶ 32-  
 27 33. "Fact" No. 10: Again, it is not in evidence how the calls to the Philippines were executed  
 28 (see *supra*) and pursuant to the Telecommunication Act. AT&T is obliged to impose security



means sufficient to verify the authorization of the service change (see supra). "Fact" No. 11 and 12: Dataway did receive a bill for the unauthorized calls. However, Mr. Lake's declaration states this bill was for the provided telecommunication services to Dataway, for the calls that were "placed using [Dataway's] system through the AT&T network by dialing carrier access code 1010288." This is entirely inaccurate. AT&T admitted that the hackers compromised the voicemail system Dataway maintained with AT&T. Adm. CC. ¶¶ 8, 18, Deposition Francisco Molieri p. 8 l.2-7, Bate-Stamp DW 003. For this reason the charges were not on Dataway's long-distance corporate bill but on a summary billing account. The type of connection was not a regular call but a "nailed-up connection" that was also detected as irregular by AT&T. Deposition of Simon Lewis p. 45 l. 13-25. Hence, Dataway's system was not only allegedly compromised but both "facts" as stated by AT&T are not in evidence. "Fact" No. 13: The charges for the unauthorized calls that were admittedly executed by hackers (see supra) amounted to \$ 11,534.67 and were wrongfully presented to Dataway on a bill due September 25, 2006. "Fact" No. 14: Tariff F.C.C. No. 30 does state that payment is due upon presentation of an invoice. Dataway's payment upon this invoice was not due because AT&T waived its charges. Adm. CC. ¶¶ 11, 21, 23. "Fact" No. 15: AT&T admitted that hackers executed the calls to the Philippines (see supra), that the charges should be waived (see supra), and that it was AT&T's liability to avoid a switching of services by unauthorized third party conduct (see supra). For these reasons, Dataway does not owe AT&T a sum of \$ 11,534.67 nor any related interest.

Therefore, Plaintiff's assertion that the material "Facts" No. 5, 6, 8, 9, 10, 11, 12, 13, 14, 15 are not in controversy is wrong. The facts are either in dispute or proven to the contrary.

For the aforementioned three reasons it appears that Mr. Lakes affidavit was submitted in bad faith and this Court should sanction Plaintiff pursuant to FED. R. CIV. P. § 56(g).

3. The remaining "Facts" No. 7, 16, 18, 19 and 20 are not proven as asserted by AT&T because AT&T stated them out of context or mischaracterized them

Despite AT&T's assertions, "Facts" No. 7, 16, 18, 19 and 20 are and remain disputed or were proven to the contrary by Dataway.

1 Plaintiff alleges in "Fact" No. 7 that "the telephone system owned and operated by  
 2 Dataway was allegedly compromised by an unauthorized intervening party accessing the  
 3 AT&T network by dialing carrier access code 1010288." Mot. SJ. p.1 l. 24-26. This statement  
 4 is materially different from Dataway's statement in its counterclaim stating that "[o]n July 24,  
 5 2006 fraudulent calls were made through Dataway's existing voice mail system using AT&T's  
 6 Legacy T network, a service Dataway never subscribed to and an account that was never authorized  
 7 by the Defendant." See Adm. CC. ¶ 13. Dataway alleged that hackers unlawfully compromised  
 8 the voicemail system Dataway maintained with AT&T. See ¶ 18 Adm. CC.; Bate-Stamp AT&T  
 9 167, Deposition of Francisco Molieri p. 7 l.18-20. Therefore, "Fact" No.7 is not proven as  
 10 asserted by AT&T but as alleged in Dataway's Counterclaim.

11 Further, AT&T asserts that there is no evidence that AT&T waived its claim involving  
 12 the charges amounting to \$ 11,534.67. See Mot. SJ. p.2 l.21-22. In fact, AT&T admitted that  
 13 "the parties conferred, and AT&T assured Dataway that AT&T would waive the charges for the  
 14 fraudulent calls once Dataway disputed them, because this pattern of illegal usage recently had  
 15 occurred frequently." See Adm. CC. p.15 l.20-22. Hence, there is evidence on record that negates  
 16 AT&T's allegation while supporting Dataway's allegation.

17 "Fact" No. 18, stating that the Telephone service was never terminated, is a fact  
 18 mischaracterized and taken out of context. Proper context demonstrates that on November 3,  
 19 2006, and even after commencement of the present litigation, on April 3, 2008, AT&T sent  
 20 Notices of Disconnect (see infra p. 10 l. 25 – p. 11 l.2 and p.18 l.19-22) and immediately  
 21 threatened to disconnect services to Dataway. Only Dataway's actions, its communication with  
 22 AT&T California and AT&T Corp., its requests to AT&T California and AT&T Corp., its  
 23 informal complaints to AT&T Corp. and various telecommunication agencies, and the  
 24 commencement of this suit avoided the final cut off of services.

25 "Facts" No. 19 and 20 as asserted by AT&T also misstate the damages suffered by  
 26 Dataway. In its Counterclaim, Dataway states compensatory and non-compensatory damages  
 27 according to proof at trial for each cause of action. This satisfies the notice pleading  
 28 requirements of the Federal Rules of Civil Procedure. Dataway made a short and plain

1 statement of each claim, showing that the Counterplaintiff is entitled to relief, and made a  
 2 demand for judgment for the relief the counterplaintiff seeks. Fed. R. Civ. P. 8(a). In its  
 3 Response to AT&T's Special Interrogatories, Dataway stated that damages include, but are not  
 4 limited to, expenditures of time, an interruption of its business, and other expenses while  
 5 attempting to resolve the dispute in an amount of \$ 57,200.00.

6 AT&T's assertion of so-called undisputed facts are, besides Facts No. 1, 2 and 17, either  
 7 (1) inadmissible, (2) remain in controversy and were disputed by Dataway's or (3) were  
 8 admitted in the contrary by AT&T due to its failure to respond (see supra).

9 **IV. AT&T CLAIMS ARE WITHOUT MERIT AND PLAINTIFF FAILS TO STATE**  
 10 **UNDISPUTED FACTS SUPPORTING THE ELEMENTS OF ITS CAUSES OF**  
 11 **ACTION**

12 The pleadings and discovery has shown that Plaintiff's Complaint is without merit.  
 13 Plaintiff's first counts, liability under 47 U.S.C. § 201 et. seq., is not actionable and therefore,  
 14 its second count, Unjust Enrichment, lacks a sufficient basis for disgorgement. In any case, all  
 15 or at least one of the elements of Dataway's causes of action cannot be established by facts on  
 16 record. Hence, there are no genuine factual issues that properly can be resolved only by a finder  
 17 of fact because both counts may reasonably be resolved only in Dataway's favor.

18 **A. 47 U.S.C. § 201 et. seq. does not impose liability on a customer like Dataway and**  
 19 **is not supported by any facts on record**

20 Plaintiff's cause of action is without merit because 47 U.S.C. § 201 et. seq. does not  
 21 create a claim for a telecommunication carrier against a customer. The Communications Act,  
 22 which encompasses the Telecommunications Act of 1996, contains several sections outlining  
 23 rules for telecommunications companies to abide by and the course of action when such rules  
 24 are broken. Section 201(b) requires common carriers to furnish service, stating that "all charges,  
 25 practices, classifications, and regulations for and in connection with such service, shall be just  
 26 and reasonable, and any such charge, practice, classification, or regulation that is unjust or  
 27 unreasonable is declared to be unlawful." 47 U.S.C. § 201. Pursuant to section 206 of the  
 28 Communications Act a common carrier shall be liable to the person injured if the carrier does,

or permits to be done, any act, matter, or thing prohibited or declared to be unlawful it shall be liable to the person injured for the full amount of damages sustained. The highly discussed issue if the Telecommunication Act creates private rights and if a failure to compensate for dial-around calls, is a violation falling within Section 201. However, as explicitly stated in Metrophones Telecommunication, this concerns merely the carrier's claims against a common carrier [Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc., 423 F.3d 1056, 1064 (9th Cir. Wash. 2005)] or a customer against a carrier. Bradberry v. T-Mobile USA, Inc., 2007 U.S. Dist. LEXIS 34826 (N.D. Cal. Apr. 27, 2007). Dataway is not a telecommunication carrier that furnished unjust or unreasonable services. Dataway is a California Corporation (see Dataway's Answer, p. 2 l.9-10) providing managed services to clients and consulting services in the computer/network and network-security. See Deposition of Simon Lewis, p. 5 l. 18-20). It is merely a telecommunication customer. 47 U.S.C. § 201 et. seq. however, do not provide for a cause of action of a telecommunication carrier against its customer.

As none of the elements of Plaintiff's First Cause of Action are met, this Court should enter summary judgment in favor of Dataway.

#### **B. Quantum Meruit is not a Cause of Action in California**

Plaintiff's second count is without merit. Unjust enrichment is "merely a theory of recovery." "There is no cause of action in California for unjust enrichment." Melchior v. New Line Productions, Inc., 106 Cal. App. 4th 779, 794, 131 Cal. Rptr. 2d 347 (2003). Accordingly, as a matter of law, AT&T's unjust enrichment claim fails as a cause of action.

As Plaintiff's claim under 47 U.S.C. § 201 et. seq. is without merit AT&T did not prove that it is entitled to restitution under the theory of quantum meruit. To the extent that this court should hold that AT&T proved it is entitled to restitution on any prevailing claim, it is not entitled to recover under this theory because the elements of quantum meruit are not supported by the record. Plaintiff's claim to disgorge profits is without merit because it does not satisfy the two elements of unjust enrichment: (1) Defendant must have received a benefit and (2) unjustly retained the benefit at the expense of another. At various times, AT&T agreed to Dataway's allegations that hackers accessed Dataway's voicemail system and conducted the

calls from a remote location. Adm. CC. ¶ 8, 18, Deposition Francisco Molieri p. 8 l.2-7, Bate-Stamp DW 003. Hence, AT&T did not render any services to Dataway and Dataway did not enjoy the alleged services. In fact, Defendant was not even aware that Plaintiff performed the questioned services let alone that AT&T expected to be paid for services rendered to a third party. Moreover, any allegation to the contrary is unsupported by the record. Additionally, Plaintiff's requested damages are highly excessive. If this court should hold that a benefit has been conferred on Dataway in expectation of payment, and Dataway was thereby unjustly enriched, the measure of recovery cannot exceed the value of the benefit AT&T has conferred upon Dataway. Plaintiff did not submit any evidence that could justify why a rate of \$ 5.78 per minute is the value of the calls illegally carried out by unknown third person even though Dataway's contractual long distance plan rate for calls to the Philippines is \$ 0.30 cents per minute.

Therefore, the evidence is clear that and that the elements for Quantum Meruit are not satisfied either. Judgment on AT&T's second cause of action in favor of AT&T should be denied and judgment in favor of Dataway is proper.

## **V. DATAWAY'S COUNTERCLAIMS ARE SUPPORTED BY FACTS IN EVIDENCE**

### **A. The Filed Rate Doctrine Does not Apply**

Dataway's claims are not barred because they do not challenge the terms of a tariff. In Lovejoy AT&T also unsuccessfully claimed that "there is no fraud exception to the filed rate doctrine." Lovejoy v. AT&T Corp., 92 Cal. App. 4th 85, 102 (Cal. App. 3d Dist. 2001). The court acknowledged that AT&T's assertion is generally true but irrelevant unless a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation. In that case the carrier cannot be held to the promised rate if it conflicts with the published tariff. The maxim that there is no "fraud" exception to the filed rate doctrine merely means that courts will not intrude into the FCC's jurisdiction by enforcing promises to charge rates or provide services which vary from the filed tariff, regardless of the promisor's intent." Id., at 102. However, "...it does *not* mean that all fraudulent conduct committed by a carrier is immune from remedy." Id., at 102. Dataway does not challenge the terms of a tariff. Dataway does not seek rate preferences

1 not accorded to AT&T's other customers and Dataway does not seek to enforce "side  
 2 agreements" which vary from published tariffs. Rather, Dataway wants to enforce the  
 3 contracted rate pursuant to the tariff. Moreover, rates have meaning only when one knows the  
 4 services to which they are attached. Any claim for excessive rates can be couched as a claim for  
 5 inadequate services and vice versa. The Communications Act recognizes this in the §§ 203(a)  
 6 and (c). American Tel. and Tel. Co. v. Central Office Telephone, Inc., 524 U.S. 214, 215.

7 In the case at hand, there was not authorization by Dataway to open the disputed Legacy  
 8 T account or to charge a fee related to the second line of service which Dataway neither had  
 9 knowledge of or requested. Similar to Brown, where the court held that a claim is not precluded  
 10 by the filed-rate doctrine if (1) the Plaintiff alleges that there is no authorization in the tariff to  
 11 charge a certain fee, and (2) that the fee therefore violated the tariff. Brown v. MCI Worldcom  
 12 Network Servs., Inc., 277 F.3d 1166, 1172 (9th Cir. 2002). Compensating the plaintiff for the  
 13 tortious conduct pleaded does not contravene the filed rate doctrine. Lovejoy, at 101. Dataway  
 14 is not seeking rate preferences not accorded to AT&T's other customers, or to enforce "side  
 15 agreements" which vary from published tariffs. Rather, Dataway only seeks enforcement of the  
 16 rate it contracted for pursuant to the tariff. Hence, Dataway merely seeks to enforce the tariff.  
 17 Consequently, Dataway's claims are not barred by the File Rate Doctrine.

18 **B. All Elements of Dataway's Five Counterclaims are Supported by Undisputed**  
 19 **Evidence on Record**

20 Counterplaintiff's claims are supported by sufficient undisputed facts and are admitted  
 21 by AT&T. As discussed above, Dataway merely filed a motion to dismiss after being served  
 22 with Dataway's Answer and its Counterclaims. As previously mentioned, a motion to  
 23 dismiss cannot be regarded as a responsive pleading though. Therefore, all facts and allegations  
 24 asserted in Dataway's Answer and Counterclaims are admitted and are in evidence pursuant to  
 25 Fed. R. Civ. P. 8(b)(6). These facts sufficiently support Dataway's five causes of action against  
 26 AT&T. For this reason, summary judgment in favor of the moving party AT&T should be  
 27 denied. Instead, summary judgment in favor of Dataway is proper and should be granted.  
 28



**1. Each Element of Breach of Express Contract is Proven**

Each element of Dataway's First Cause of Action are supported by undisputed facts which only permits a reasonable jury to decide in Dataway's favor.

To prove a breach of contract claim, the plaintiff must show 1) a contract; 2) plaintiff's performance or excuse for nonperformance; 3) defendant's breach; and 4) resulting damage to the Plaintiff. Qwest Communs. Corp. v. Herakles, 2008 U.S. Dist. LEXIS 22154, 18 (D. Cal. 2008).

Two written instruments lie at the heart: (1) the telecommunication service agreement between Dataway and SBC/AT&T and (2) the Anti-Slamming Agreement. Both constitute legally binding, enforceable and reasonable contracts between SBC's successor AT&T and Dataway. California law requires four elements to form a valid contract: (1) parties capable of contracting; (2) their mutual consent; (3) a lawful object; and (4) sufficient consideration. Cal. Civ. Code §§ 1550, 1565. These four elements are obviously met by the service contract and the Anti-Slamming agreement. The aforementioned two agreements are valid and enforceable contracts and contemplate an implied warranty to impose security means restricting access by third parties. Furthermore, Dataway duly performed all its contractual obligations. It made and still makes payments covering AT&T's charges for Dataway's authorized account usage. However, AT&T's conduct was arbitrary and unreasonable. Adm. CC. ¶¶ 19. On July 24, 2006, hackers illegally accessed the voice mail system Dataway maintained with AT&T. The hacker used AT&T's Legacy T network to conduct calls to the Philippines. Deposition Francisco Molieri p. 8 l.2-7. AT&T billed these calls at a rate of \$ 5.78 per minute. According to the contractual long distance plan rate, calls to the Philippines cost \$ 0.30 cents per minute. However, the arbitrary \$5.67 rate used to calculate the unauthorized calls is 1,920% higher than Defendant's contracted rate. Hence, AT&T (1) switched to a non-contractual rate, and (2) created an account for Dataway without Dataway's authorization. This switch and unauthorized account creation only occurred because the routing number of the calls pointed to Dataway. AT&T allowed a switching of services without applying sufficient verification procedures and failed to avoid an unwanted switching as required under AT&T's contractual obligation.

1 Furthermore, on November 3, 2006 and April 3, 2008 (after commencement of the present  
 2 litigation) AT&T sent a Disconnect Notice to Dataway, threatening Dataway to disconnect its  
 3 authorized account despite Dataway's continued payments throughout. This non-performance  
 4 constitutes a contractual breach of AT&T's duties and warranties warranty obligations.

5 The Civil Code states that "[f]or the breach of an obligation arising from contract, the  
 6 measure of damages, except where otherwise expressly provided by this code, is the amount  
 7 which will compensate the party aggrieved for all the detriment proximately caused thereby, or  
 8 which, in the ordinary course of things, would be likely to result therefrom." Cal. Civ. Code §  
 9 3300. Therefore, despite AT&T's claims, Cal. Civ. Code § 3300 does not limit the types of  
 10 available damages. Instead § 3300 limits an award of contract damages to those damages that  
 11 arise naturally from a breach of the contract or those that would reasonably be foreseen by the  
 12 parties as arising from a breach of the contract. Glendale Fed. Sav. & Loan Ass'n v. Marina  
 13 View Heights Dev. Co., 66 Cal. App. 3d 101, 125 (App. Ct. 1977). The damages sought by  
 14 Dataway for AT&T's breach of contract compromise of damages that naturally arise from and  
 15 would be reasonably foreseen by the parties as arising from a breach of the contract. Business  
 16 interruption and expenditure of time naturally arise from AT&T's breach of its contract.  
 17 Damages for breach of contract are intended to give the injured party the benefit of his or her  
 18 bargain. Martin v. U-Haul Co. of Fresno, 204 Cal. App. 3d 396, 409 (Ct. App. 1988). The aim  
 19 is to put the injured party in as good a position as he or she would have been if performance had  
 20 been rendered as promised. Brandon & Tibbs v. George Kevorkian Accountancy Corp., 226  
 21 Cal. App. 3d 442, 468 (Ct. App. 1990). Had AT&T not breached the contract, Dataway would  
 22 not have had to expend time resolving the improper billing and would not have experienced  
 23 business interruption. An award of damages to compensate Dataway for this business  
 24 interruption and its expenditure of time is necessary to put Dataway in as good a position as it  
 25 would have been in had AT&T not breached the contract. These damages amount to \$  
 26 57,200.00 as calculated in Dataway's Response to AT&T's Special Interrogatories.

27 Judgment on Dataway's first counterclaim in favor of AT&T is not proper. Dataway has  
 28 properly established by use of undisputed facts all of the elements of a claim for breach of



1 contract including the amount of allowable damages. Hence, summary judgment Dataway's  
2 favor is proper and should be granted.

3 **2. Each Element of a Breach of Oral Contract is Established by Undisputed Facts**

4 AT&T's mischaracterization of Dataway's second counterclaim as "simply alleg[ing]  
5 'waiver'" is patently false. See Mot. SJ. p.9 l.1. Dataway is correct in stating that "an allegation  
6 of 'waiver' does not constitute a claim for affirmative relief." *Id.* at l.4. Dataway does not allege  
7 waiver. Rather, Dataway alleges breach of oral contract. A brief explanation of AT&T's cited  
8 case Kern Sunset Oil Co. demonstrates the difference between waiver and the breach of oral  
9 contract as alleged by Dataway. Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435  
10 (1931). In Kern, the plaintiff landlord sued for breach of a lease. However, the landlord had  
11 accepted rent from the lessee after the breach occurred without objecting to the breach.  
12 Therefore, the court found that the landlord had waived his ability to bring a claim for breach of  
13 the lease. Dataway is not attempting to bring an affirmative claim for waiver. Rather, Dataway  
14 is bringing a claim for breach of oral contract. The fact that the counterclaim describes AT&T  
15 agreeing to "waive its charges for the fraudulent calls" does not transform the properly alleged  
16 breach of oral contract claim into an affirmative claim of waiver as AT&T alleges. See Adm.  
17 CC. ¶ 21.

18 To prove the existence of an oral contract, a Plaintiff must prove the following  
19 elements: (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that  
20 plaintiff performed all the terms and conditions required under the contract; (4) defendant's  
21 breach of the contract in some particular way; and (5) that plaintiff suffered damages as a result  
22 of the breach. W. Reserve Life Assur. Co. v. Bratton, 2007 U.S. Dist. LEXIS 46351 (D. Iowa  
23 2007)

24 After Dataway contacted AT&T's local managers on September 20, 2006 (see DW  
25 001), and requested the removal of the disputed charges from its accounts, an oral agreement  
26 was reached in which AT&T agrees to waive its charges for the fraudulent calls once Dataway  
27 formally disputed them. See Bate-Stamps DW 003, 006, AT&T 82, Deposition of Francisco  
28 Molieri p. 13 l.1-7. On November 10, 2006, Dataway performed its contractual duties.

Consequently, Defendant submitted a written denial and sent a duly completed form to AT&T's Fraud Resolution Group with copies to AT&T. See Bate-Stamp 003, AT&T 122-124, AT&T 5-6, AT&T 153. However, AT&T failed to perform its contractual obligations. Even though (1) the threatened disconnection was suspended, (2) Dataway was once again reassured that AT&T would drop all charges and (3) AT&T sent a November 2007 account statement stating that Dataway's account was balanced. See Bate-Stamp AT&T141. It was not until January 2007 that Dataway was notified of AT&T's referral of the dispute to a collection attorney for litigation proceeding. At that point, Dataway realized that AT&T did not intend to honor its oral contract with Dataway.

Dataway has suffered damages in an amount of \$ 57,200.00 as a result of AT&T's breach. The damages sought by Dataway for AT&T's breach of contract both naturally arise from and are foreseeable by the parties as arising from a breach of the oral contract. Business interruption and expenditure of time naturally arise from AT&T's breach of its contract. Had AT&T not breached the contract, Dataway would not have had to expend time resolving the improper billing and would not have experienced business interruption. An award of damages to compensate Dataway for this business interruption and its expenditure of time is necessary to put Dataway in as good a position as it would have been had AT&T not breached the contract. See *supra*, p. 13 l. 5-26.

Judgment on Dataway's Second Counterclaim in favor of AT&T is not proper. Dataway has properly established by use of undisputed facts all of the elements of a claim for breach of oral contract including the amount of allowable damages. Hence, summary judgment Dataway's favor is proper and should be granted.

### **3. Each Element of Fraudulent Inducement to Contract is Proven**

Fraudulent inducement to contract is a recognized cause of action. In essence, it is a claim of promissory fraud. Engalla v. Permanente Medical Group, Inc., 64 Cal. Rptr. 2d 843, 857 (Cal. 1997). Its elements are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." Witkin, Summary of Cal. Law (9th

1 ed. 1988) Torts, § 676, p. 778; Civ. Code, § 1709. “An action for promissory fraud may lie  
2 where a defendant fraudulently induces the plaintiff to enter into a contract.” Lazar v. Superior  
3 Court, 12 Cal. 4th 631, 638 (Cal. 1996). In January 2003 AT&T affirmatively misrepresented to  
4 Dataway that pursuant to the express terms of the parties' Carrier Slamming Protection  
5 agreement, AT&T would be the exclusive long-distance telecommunication carrier and a  
6 switching to other services would be impermissible; Dataway would be only responsible for  
7 charges for which it had contracted. See Letter of Agency and Carrier Slamming Protection  
8 Agreement. SBC/AT&T included this protection in accordance with 47 U.S.C § 258(a), its  
9 implementing F.C.C. Regulations and the Public Utilities Code section 2889.5, preventing  
10 telecommunication carriers from making unauthorized changes to subscribers' telephone  
11 service. In November 2005, AT&T and SBC merged. AT&T assured former SBC customers  
12 that their contractual relations will be continued without any changes and under the same  
13 conditions. AT&T knew or should have known that its representations were false because other  
14 incidents have shown that such a slamming device was not an appropriate means, in particular  
15 with regard to the imminent acquisition of SBC by AT&T. See Bate-Stamps 11-23. The narrow  
16 wording of the Anti-Slamming Agreement would be useless if not applied to AT&T's  
17 sprawling corporate structure. As such, SBC/AT&T knew and did not intend to protect  
18 Dataway from switching between different services as required by 47 U.S.C. § 258(a).  
19 Nevertheless, AT&T assumed all of SBC's liabilities when it acquired SBC. Moreover, it knew  
20 that a switching was possible because the pattern of illegal usage had occurred frequently prior  
21 to the disputed incident. See Bate-Stamps 11-23. The technical team based in New Jersey stated  
22 in phone conferences with Dataway that it was familiar with the type of phone hacking  
23 Dataway had experienced and that such incidents were epidemic. Deposition of Francisco  
24 Molieri p. 58 l. 25 – p. 59. l 2, Deposition of Simon Lewis p.45 l.13-25. Despite this  
25 knowledge, SBC/AT&T made the aforementioned representations and reassured Dataway that  
26 its contracts will be continued by AT&T after it acquired SBC. This was obviously done with  
27 the intent to induce Dataway to remain a customer of SBC/AT&T. Justifiable reliance is an  
28 essential element of the claim. Such reliance exists when, absent the misrepresentation, the

1 allegedly defrauded party would *not* have entered into the bargain. "False representations made  
 2 recklessly and without regard for their truth in order to induce action by another are the  
 3 equivalent of misrepresentations knowingly and intentionally uttered." Engalla, at 857.  
 4 Dataway relied on Counterdefendant's representations that Dataway would only be charged for  
 5 the contracted rate, and for only authorized services. Dataway also relied on AT&T's  
 6 representation that AT&T faithfully assumes SBC's business and obligations. Due to a lack of  
 7 prior negative incidents it had no reason to doubt AT&T's representations and was justified in  
 8 relying on them. Based on SBC/AT&T's representations regarding its telecommunication  
 9 services and its Anti-Slamming protection, Dataway entered into the telecommunication service  
 10 contract. Dataway believed AT&T would provide the protection sought for Dataway's business  
 11 telecommunication.

12 An award of damages to compensate Dataway for this business interruption and its  
 13 expenditure of time is necessary to put Dataway in as good a position it would have been in had  
 14 AT&T not breached the contract. These damages are in evidence as shown supra.

15 Judgment on Dataway's Third Counterclaim in favor of AT&T is not proper. Dataway  
 16 has properly established by use of undisputed facts all of the elements of a claim for Fraudulent  
 17 Inducement to Contract including the amount of allowable damages. Hence, summary judgment  
 18 Dataway's favor is proper and should be granted.

#### 19 **4. Each Element of Slamming is Established by Undisputed Facts**

20 The Telecommunication Act makes it unlawful for telecommunication carriers to  
 21 "submit or Execute a change in a subscriber's selection of a provider of telephone exchange  
 22 service or telephone toll service except in accordance with such verification procedures as the  
 23 Commission shall prescribe." 47 U.S.C. § 258(a).

24 The facts asserted by AT&T to support its allegation that all changes were authorized  
 25 are not in evidence and are not sufficient to eliminate Plaintiff's Fourth Counterclaim.  
 26 As discussed above, Dataway asserted in its Counterclaim that hackers illegally accessed the  
 27 voice mail system Dataway maintained with AT&T using AT&T's Legacy T Network. See  
 28 supra. The assertion that it was Dataway's obligation to prevent hacking is unsupported by the

1 evidence. Dataway had security means in place (see supra). Further, AT&T, not Dataway was  
 2 in the position to prevent the hacking and resulting phone calls.

3 In his deposition, Simon Lewis states that Dataway has the strongest physical security  
 4 means in place. The company buildings are secured by biometric fingerprint readers on the  
 5 front doors (See Deposition of Simon Lewis, p. 35 l.24-25), Medeco locks (Id., p. 36 l.1-5), and  
 6 card readers (Id., p. 36, l.6). Dataway's voicemail system was secured by a password that was  
 7 frequently changed (See Deposition of Francisco Molieri, p.12 l.15 to p.15 l. 22). These  
 8 security means could not have prevented the unauthorized access by third parties because the  
 9 hackers accessed the voicemail system (see Bate-Stamp AT&T 167) from a remote location  
 10 outside Dataway's premises. In fact, the fraudulent calls originated from Kansas (Id., p.18 l.15-  
 11 18) as identified by the caller ID. Deposition of Simon Lewis, p. 11, l.9-13. This means, only a  
 12 telecommunication specialist could have avoided an intrusion of the telephone circuit/wire  
 13 itself. This is also supported by the fact that AT&T informed AT&T of the monitored hacking  
 14 (See Declaration of Francisco Molieri, p. 8) and that AT&T can easily recognize these calls.  
 15 See Declaration Simon Lewis, p. 45 l. 18-20.

16 Moreover, the Telecommunications Act makes it unlawful for telecommunications  
 17 carriers to "...submit or execute a change in a subscriber's selection of a provider of telephone  
 18 exchange service or telephone toll service except in accordance with such verification  
 19 procedures as the Commission shall prescribe." 47 U.S.C. § 258(a). In its rules implementing  
 20 section 258 and conforming its pre-existing anti-slamming regulations to the new statute the  
 21 Commission established various procedures that carriers must use to verify the subscriber's  
 22 authorization to submit the preferred carrier change order. These procedures, which vary  
 23 depending on how the carrier chooses to market its services, include obtaining both "(i)  
 24 Authorization from the subscriber, and (ii) Verification of that authorization in accordance with  
 25 the procedures prescribed in this section." 47 C.F.R. § 64.1120(a)(1). "[A]ppropriate  
 26 verification data..." can be the subscriber's date of birth or his social security number. 47  
 27 C.F.R. § 64.1120(a)(1), (c)(1), (c)(3)). The court in In Re Matter of Implementation of the  
 28 Subscriber Carrier Selection held that "...in the course of verifying the subscriber's intention to

1 change his or her long distance service, a submitting carrier's independent, third party verifier is  
 2 required to elicit confirmation that the person contacted is authorized to make the change.  
 3 Additionally, the Public Utilities Code Section 2889.5 also contains certain mandatory  
 4 disclosure requirements for a carrier to follow when making any change in the provider of  
 5 telephone service. Included among them is to "thoroughly inform the subscriber of the nature  
 6 and extent of the service being offered..." (Pub. Util. Code, section 2889.5 (a)(1)), verifying  
 7 whether "...the subscriber intends to make any change in his or her telephone service provider,  
 8 and explain any charges associated with that change." Pub. Util. Code, section 2889.5(a)(2) In  
 9 re Implementation of the Subscriber Carrier Selection et al., 23 F.C.C.R. 493.

10 AT&T merely uses an automated computer to identify the caller's authority. This  
 11 computer cannot distinguish if it is communicating properly with an authorized human or  
 12 improperly with another machine or computer. These facts establish, that AT&T did not  
 13 comply with any of the imposed requirements. Therefore, AT employed procedures that clearly  
 14 violated the Telecommunication Act.

15 Due to this illegal conduct, Dataway has been, and will continue to be injured. An award  
 16 of damages to compensate Dataway for this business interruption and its expenditure of time is  
 17 necessary to put Dataway in as good a position it would have been in had AT&T not breached  
 18 the contract. These damages are in evidence as shown supra.

19 Judgment on Dataway's Fourth Counterclaim in favor of AT&T is not proper. Dataway  
 20 has properly established by use of undisputed facts all of the elements of a claim for Violation  
 21 of the Telecommunication Act including the amount of allowable damages. Hence, summary  
 22 judgment Dataway's favor is proper and should be granted.

### 23 **5. Each Element of Tortious Interference with Contractual Relations is Proven**

24 In order to prevail on a claim for tortious interference with contract, plaintiff must show  
 25 (1) the existence of a valid contract with a third party; (2) defendants' knowledge of that  
 26 contract; (3) defendants' intentional acts designed to disrupt or induce a breach of the  
 27 contractual relationship, (4) actual disruption or breach of the contractual relationship, and (5)  
 28 resulting damage proximately caused by the acts of the defendant. Bank of N.Y. v. Fremont



1 General Corp., F.3d, 2008 WL 269458 (9th Cir. 2008); Givemepower Corp. v. Pace  
 2 Compumetrics, Inc., 2007 U.S. Dist. LEXIS 59371 (D. Cal. 2007), 17. Claims for tortious  
 3 interference with contract do not require pleading that defendants' conduct was independently  
 4 wrongful because "intentionally interfering with a contract is a wrong in and of itself." *Id.* at  
 5 1158.

6 Dataway maintained an economic relationship with SBC/AT&T by using SBC/AT&T  
 7 as its only business telecommunication carrier. Plaintiff alleges that the hacker knew and  
 8 purposefully chose to access a voicemail system set up with AT&T. AT&T had superior  
 9 authority and control over the Dataway's account, yet recklessly did not provide sufficient  
 10 security to impede or prevent hackers from accessing Dataway's voice mail system. The only  
 11 available security Dataway could employ itself was to protect its voicemail system using a  
 12 password which it periodically changed. Deposition of Francisco Molieri p.12 l.15 to p.15 l. 22

13 AT&T's intentional failure to properly secure Dataway's SBC/AT&T account led to  
 14 abnormal and excessive charges that brought about the current dispute between Dataway and  
 15 AT&T.

16 Dataway has been, and will continue to be irreparably injured by the hacker's reckless  
 17 impairment of its contractual relationship, specifically AT&T's failure to prevent fraudulent use  
 18 of the Legacy S services for which Dataway and SBC originally contracted.

19 Moreover, AT&T's creation of a Legacy T account and its billing for Legacy T network  
 20 services were intentional interferences with the existing relationship Dataway had with  
 21 SBC/AT&T, its Legacy S account. AT&T accurately states that the tort of intentional  
 22 interference may be asserted only against "outsiders" where "outsiders" merely means parties  
 23 that have no legitimate social or economic interest in the contractual relationship. Kasparian v.  
 24 County of L.A., 45 Cal. Rptr. 2d 90, 100 (Cal. App. 2d Dist. 1995). Here, the original  
 25 contracting parties were Dataway and SBC with whom Dataway maintained a Legacy S  
 26 account. The interference complained of, was the creation of an AT&T long distance Legacy T  
 27 account. While AT&T, due to its merger with SBC, is technically a party the Court should treat  
 28 AT&T as an "outsider." AT&T still distinguishes between Legacy S (under the SBC contracts)

1 and Legacy T (under the AT&T contracts). AT&T had no legitimate interest in the Legacy S  
2 contract because it never negotiated the Legacy S service rates and conditions and in fact  
3 desired to adapt Dataway's account to AT&T standards.

4 Public policy considerations dictate that the Court should recognize AT&T's tortuous  
5 interference with the contract originally negotiated between Dataway and SBC. AT&T is an  
6 international corporation of significant power, one of only 30 companies to be deemed  
7 important to be listed on the Dow Jones Industrial Average. Such a corporation is capable of  
8 exerting significant pressure on its customers, particularly small business customers that depend  
9 on the services provided by AT&T for the existence of their business. While losing a customer  
10 is a detriment to AT&T's business, AT&T is clearly in a position of strength when dealing with  
11 its small business customers.

12 AT&T has engaged in tortuous behavior that caused detriment to Dataway. AT&T's  
13 behavior directly interfered with the contract for services negotiated and entered into between  
14 Dataway and SBC. Had AT&T not recklessly failed to safeguard its system, there would have  
15 been no interference with the Dataway/SBC contract. Failure by the Court to hold AT&T liable  
16 for this behavior would allow AT&T, the proverbial Goliath, to tortuously interfere with  
17 Dataway, the proverbial David, and face no consequence.

18 The remaining elements of this cause of action are supported by undisputed facts as  
19 well. See Dataway's Counterclaim, p. 15 l.5-p. 16 l. 16 and p. 20 l. 9-25; Bate-Stamp AT&T5  
20 and AT&T6, In January 2003, Dataway and SBC/AT&T entered into a service contract. Ms.  
21 Carswell's e-mails, the bills and the deposition show that AT&T knew of this business  
22 relationship due to AT&T's regular business activities it should have known of the contract  
23 between Dataway and the SBC/AT&T. Nevertheless, AT&T created an account without  
24 Dataway's knowledge or authorization improperly on the basis that an unknown third person or  
25 persons illegally accessed the voice mail system Dataway maintained with AT&T and used  
26 AT&T's Legacy T network to conduct calls to the Philippines. See Deposition of Francisco  
27 Molieri, p. 8. By reason of the resulting charges AT&T sent a bill to Dataway knowing it was  
28 exceeding contracted rate ultimately encouraging a dispute over Dataway's original service



1 contract. See Bates-Stamps AT&T2. On November 3, 2006 and April 3, 2008 (after  
 2 commencement of the present litigation), AT&T sent a disconnect notice threatening the  
 3 termination of the service that Dataway had contracted for its business telecommunication.  
 4 Dataway, worried about an interruption of its services and searching for alternative carriers  
 5 contacted AT&T's local managers trying to resolve the problem.

6 Due to both interferences by AT&T, Dataway has been, and will continue to be injured.  
 7 An award of damages to compensate Dataway for this business interruption and its expenditure  
 8 of time is necessary to put Dataway in as good a position it would have been in had AT&T not  
 9 breached the contract. These damages are in evidence as shown supra.

10 Judgment on Dataway's Fifth Counterclaim in favor of AT&T is not proper. Dataway  
 11 has properly established by use of undisputed facts all of the elements of a claim for Tortious  
 12 Interference with Contractual Relations including the amount of allowable damages. Hence,  
 13 summary judgment Dataway's favor is proper and should be granted.

#### 14 **VI. CONCLUSION**

15 For the foregoing reasons, Defendant Dataway respectfully requests that this Court enter  
 16 summary judgment in Dataway's favor on all counts of its Countercomplaint and denies  
 17 Plaintiff's Motion for Summary Judgment on AT&T's Complaint for Damages.

18  
 19 Dated: July 15, 2008

MATLOCK LAW GROUP

20  
 21  
 22 By: 

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 24 Attorneys for Defendant/ Counterclaimant  
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 27  
 28